IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

DARRYL ASHMORE,

Plaintiff,

vs. Case No. 9:16-cv-81710-KAM

NFL PLAYER DISABILITY &
NEUROCOGNITIVE BENEFIT PLAN,

Defendant.

DEFENDANT'S MOTION TO STRIKE CERTAIN MATERIALS OUTSIDE THE ADMINISTRATIVE RECORD AND MEMORANDUM IN SUPPORT THEREOF

Defendant, the NFL Player Disability & Neurocognitive Benefit Plan, brings this Motion to Strike Certain Materials Outside the Administrative Record and respectfully requests that the Court strike Exhibit F (ECF 40-6) and Exhibit G (ECF 40-7) to Plaintiff's motion for summary judgment.

ARGUMENT

In this action to recover benefits under ERISA section 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B), the ultimate question for the Court is whether the Disability Board, the administrator of the NFL Player Disability & Neurocognitive Benefit Plan ("Plan"), abused its discretion when it denied Ashmore's application for disability benefits. When answering that question, the Court's review is unquestionably "limited to consideration of the material [that was] available to the [Board] at the time it made its decision."[1] As Ashmore himself explained,

[1] *Blankenship v. Metro. Life Ins. Co.*, 644 F.3d 1350, 1354 (11th Cir. 2011). *See also Turner v. Delta Family-Care Disability & Survivorship Plan*, 291 F.3d 1270, 1273 (11th Cir. 2002) ("The Court of Appeals must determine

the Court "must examine 'the facts as known to the administrator at the time the decision was made' to determine whether the administrator's decision to deny benefits was reasonable.'"[2] "The Eleventh Circuit has interpreted 'facts known to the administrator' to be synonymous with the information contained in the administrative record."[3]

The 800-page "Administrative Record" (ECF 39-2 through ECF 39-7) that the Plan produced in discovery and filed with its motion for judgment (ECF 39, ECF 39-1) contains the evidence that was available to the Board at the time of its decision. Documents bearing the legend "DBM – 8/17/2016" were collected by Plan staff and presented to the Board in conjunction with the August 17, 2016 quarterly meeting where the Board considered Ashmore's application for benefits.

Ashmore's motion for summary judgment presents two sets of documents that are not contained in the Administrative Record and were never before the Disability Board:

1) **Exhibit F** (ECF 40-6) is a July 28, 2016 letter enclosing medical reports that purportedly support Ashmore's eligibility for benefits. As Ashmore acknowledges, these documents were not presented to the Disability Board because Ashmore's counsel submitted the documents beyond the deadline for doing so. Also, Ashmore's counsel represented that

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whether, based on the evidence of record, it agrees with the District Court that the Plan had some reasonable basis for its decision to discontinue claimant's long-term disability benefits so that the Plan's decision was not arbitrary or capricious."); *Jett v. Blue Cross & Blue Shield of Alabama, Inc.*, 890 F.2d 1137, 1140 (11th Cir. 1989) ("[T]he district court should limit its review to consideration of the material available to Blue Cross at the time it made its decision. As long as a reasonable basis appears for Blue Cross' decision, it must be upheld as not being arbitrary or capricious, even if there is evidence that would support a contrary decision. Should Jett wish to present additional information that might affect the determination of eligibility for benefits, the proper course would be to remand to Blue Cross for a new determination....").

[2] Pl.'s Mot. for Prot. Order Prohibiting Def.'s Discovery (ECF 17) at 3 (quoting *Glazer v. Reliance Standard Life Ins. Co.*, 524 F.3d 1241, 1246 (11th Cir. 2008)).

[3] *Id.*

the materials were duplicates of records he had previously provided, so for that additional reason they were not presented to the Board.[4]

2) **Exhibit G** (ECF 40-7) is an August 24, 2016 letter enclosing additional medical reports that purportedly support Ashmore's eligibility for benefits. These documents were not before the Disability Board.[5] In fact, Ashmore's counsel submitted the documents *after* the Disability Board made its decision on August 17, 2016.[6]

Under settled precedent, the Court should strike these documents. They should have no bearing whatsoever on the sole question before the Court: whether the Disability Board's decision was reasonable based on the evidence before it on August 17, 2016.

Ashmore may argue that Exhibits F and G should be part of the record because he delivered those documents to the NFL Player Benefits Office. Delivering the documents to the Plan's office in Baltimore, Maryland, however, does not automatically mean that they can or will be presented to the Board. Unlike many disability plans, the Plan's decision-makers do not reside at the Plan's office.[7] The Board members live in different locations throughout the country, and they convene on a quarterly basis to conduct Plan business.[8] The Board therefore relies on Plan staff to assemble and prepare pertinent application-related materials in advance of each quarterly meeting.[9] To facilitate this process, the Plan asks Players to submit application-

[4] *See* Pl.'s Mot. for Sum. Jgmt. ("Pl.'s Mot.," ECF 40) at 11, ¶ 48 n.4 (noting that the July 28, 2016 letter and its attachments are not in the Administrative Record).

[5] *See* Pl.'s Mot. at 11, ¶ 49 n.5 (noting that the August 24, 2016 letter and its attachments are not in the Administrative Record)

[6] *See* 8/24/2016 Ltr. fr. M. Miller to D. Ashmore (811) (final decision letter noting that the Disability Board decided Ashmore's appeal on August 17, 2016).

[7] Decl. of Hessam ("Sam") Vincent ("Vincent Decl.," Ex. A) ¶ 5.

[8] *Id.* ¶ 6.

[9] *Id.* ¶ 7.

related materials 30 days in advance of each Board meeting.[10] Ashmore, for example, was told to submit material by July 19, 2016,[11] and he missed this deadline with both Exhibit F and Exhibit G. Thus, through no fault of the Plan or its staff, Exhibits F and G were not before the Disability Board when it decided Ashmore's application for benefits.[12]

Ashmore has not moved the Court to supplement the Administrative Record with Exhibits F and G. He should not be able to unilaterally expand the Administrative Record by attaching those documents—materials that he failed to properly submit during the administrative phase—to his motion for summary judgment. The law in this Circuit is clear: "Should [Ashmore] wish to present additional information that might affect the determination of [his] eligibility for benefits, the proper course would be to remand [this case] to [the Plan] for a new determination."[13]

CONCLUSION

For the foregoing reasons, the Court should grant this motion and strike Exhibit F and Exhibit G to Plaintiff's motion for summary judgment.

[10] *Id.* ¶ 8.

[11] 5/4/2016 Ltr. fr. P. Scott to D. Ashmore (694) ("If you wish to submit additional evidence in support of your appeal, it must be received in the NFL Player Benefits Office by July 19, 2016.").

[12] Vincent Decl. ¶¶ 9-10.

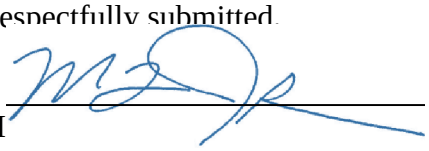
[13] *Jett*, 890 F.2d at 1140.

CERTIFICATE OF GOOD FAITH CONFERENCE
CONFERRED BUT UNABLE TO RESOLVE ISSUES PRESENTED IN THE MOTION

Pursuant to Local Rule 7.1(a)(3)(A), the undersigned counsel for movant hereby certifies that he has conferred with counsel for Plaintiff in a good faith effort to resolve the issues presented by this motion but has been unable to resolve those issues.

Dated: December 1, 2017

Respectfully submitted,



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COUNSEL FOR DEFENDANTS

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 1st day of December, 2017, a true and correct copy of the foregoing DEFENDANT'S MOTION TO STRIKE CERTAIN MATERIALS OUTSIDE THE ADMINISTRATIVE RECORD was electronically filed with the Clerk of the Court by using the CM/ECF system, which will send a notice of electronic filing to the following counsel for Plaintiff:

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